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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB - 8 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of)
)
Rulemaking to Amend Part 1 and)
Part 21 of the Commission's Rules to)
Redesignate the 27.5-29.5 GHz Band and)
to Establish Rules and Policies for)
Local Multipoint Distribution Service;)
)
Applications for Waiver of the)
Commission's Common Carrier Point-to-)
Point Microwave Radio Service Rules.)
)

CC Docket No. 92-297

RM-7872; RM-7722

Petition for Reconsideration

Albert Halprin
Stephen L. Goodman
Halprin, Temple & Goodman
Suite 1020, East Tower
1301 K Street, N.W.
Washington, D.C. 20005
(202) 371-9100

Dated: February 8, 1993

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SUMMARY

Video/Phone seeks reconsideration of that portion of the Commission's recent 28 GHz decision that denied on a wholesale basis the pending waiver requests and dismissed the applications. The Commission's analysis was wholly conclusory, and failed to consider adequately the public interest benefits that would likely flow from grant of waivers and prompt deployment of these new services.

The arguments put forth by the Commission to support its decision are without foundation. Grant of the waivers would not result in a de facto reallocation, because the Commission can condition the waivers or licenses. Grant of the waivers would not be detrimental to the assigned point-to-point users, because as the Commission itself recognizes, there are no such users at present, and Video/Phone believes that there will not be any such point-to-point users that cannot be accommodated in the markets for which companies related to Video/Phone applied.

In addition, precedent supports grant of the waivers, because the Commission on numerous occasions has granted waivers during the pendency of a rulemaking. Moreover, the Commission's action in dismissing wholesale the waiver requests is inconsistent with court decisions that require the Commission to consider carefully the public interest impact of a waiver decision. As demonstrated in our waiver requests, grant of the waivers and prompt deployment of these new services would well serve the public interest. Finally, the Commission's decision failed to take into account possible differences among the waiver requests and applications.

For all of these reasons, Video/Phone requests that the Commission reinstate the dismissed applications and proceed promptly to grant such of the waiver requests and applications as appropriate.

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Point Microwave Radio Service Rules.

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Petition for Reconsideration

Video/Phone Systems, Inc. ("Video/Phone"), through its attorneys, hereby petitions for reconsideration of that portion of the 28 GHz Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration^{1/} that dismissed all of the pending applications involving waivers of the Point-to-Point Microwave Radio Service Rules.^{2/} Video/Phone had proposed a Local Wireless Broadband Service ("LWBS") in a separate petition for rulemaking, and in addition, through related companies, had filed requests for waiver and applications to provide LWBS in the

^{1/} Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, CC Docket No. 92-297, FCC 92-538, released January 8, 1993 (hereafter cited as "28 GHz NPRM").

^{2/} In addition to Video/Phone, we understand that this petition for reconsideration is supported by numerous other applicants who were amongst the applicants dismissed by the Commission's January 8, 1993 Order.

28 GHz band. Thus, Video/Phone was adversely impacted by the Commission's action.

Video/Phone believes that the Commission erred when it denied on a wholesale basis the waiver requests and dismissed the pending applications without considering the individual merits, or without properly considering the public interest effects of its decision. As detailed below, Video/Phone urges the Commission to reinstate the dismissed applications, and to proceed promptly to grant the waiver requests and applications where appropriate.^{3/}

The Commission's analysis of the legal and factual circumstances surrounding the waiver requests was wholly conclusory. The Commission listed four bases for its decision to dismiss all of the pending applications: grant of the waivers would result in a de facto reallocation of the spectrum; grant of the waivers would be detrimental to the assigned users (potential future point-to-point applicants); grant of the waivers would be inconsistent with guidance provided by the courts; and no equitable distinctions could be made among the applications. As

^{3/} At the very least, Video/Phone believes that dismissal of the applications was unwarranted, since the Commission could leave the applications pending during the rulemaking and afford the applicants an opportunity to amend their applications to conform to whatever rules are ultimately adopted. Such a remedy eliminates the need for the applicants to re-file (with attendant costs for the Commission and the applicants), although merely allowing the applications to remain on file without granting any waiver requests would eliminate the enormous potential public interest benefits that would flow from prompt deployment of these new services.

detailed below, each of these assertions by the Commission is incorrect.

Grant of the Waivers Would Not
Constitute a De Facto Reallocation

The grant of waivers would not constitute a de facto reallocation of the band, because the Commission can condition the waivers on the outcome of the rulemaking proceeding. Under such conditioning, the licensee would assume the risk that the spectrum was reallocated, and the licensee would be required to conform its operations to the technical specification adopted in the rules that are adopted. The Commission would thus make clear that grant of the waivers is without prejudice to the ultimate outcome of the rulemaking, so that the Commission would not feel compelled to proceed with a reallocation, or otherwise feel constrained in its fashioning of the technical and service rules. Under these circumstances, there would be no prejudgment of the rulemaking, nor any de facto reallocation of the spectrum pending the rulemaking.^{4/}

^{4/} Indeed, the Commission on numerous occasions has granted waivers during the pendency of a rulemaking, indicating that the waivers were not intended to prejudge the outcome of the rulemaking proceedings. See, pp. 5-8, infra.

Grant of the Waivers Would Not Be
Detrimental to the Assigned Users

The Commission's second assertion -- that grant of the waivers would be detrimental to the point-to-point users currently eligible in this band because spectrum assigned to the waiver applicants would no longer be available to those point-to-point users -- is also without any basis in fact. Indeed, as the Commission itself observed in the 28 GHz NPRM at para. 3, "the 28 GHz band is virtually unused". Moreover, as the Commission indicated in the 28 GHz NPRM at para. 5, although this band has been available for point-to-point microwave radio common carrier use since 1959, the only licensees (other than Hye Crest) for this band were for a few temporary fixed licenses authorized under Part 21, and very little use has been made of this band since 1959. Thus, the Commission's concern for the assigned point-to-point users appears to be misplaced.

At least in the case of the applications filed on behalf of Video/Phone, moreover, the Commission's assertion that grant of the waivers would foreclose the accommodation of point-to-point licensees is inaccurate. In light of the current use of the spectrum, and the planned deployment schedules and intended use of the spectrum, it would be still possible for the Commission to meet the needs of any future point-to-point applicants even if the waivers requests of Video/Phone were granted.^{5/}

^{5/} See the statement of Don Franco, attached as Exhibit A.

Finally, it is far from evident, in light of the history of non-usage as well as the Commission's announced intention to reallocate the spectrum, that any such future point-to-point applicants are likely to appear. Indeed, it is highly unlikely that manufacturers are going to develop commercially available equipment to operate point-to-point transmissions in the 28 GHz band for the U.S. market in light of the Commission's proposal to reallocate this spectrum. Thus, the Commission's concerns appear to be irrelevant as well as inaccurate.

Grant of the Waivers Is Not Inconsistent With Precedent

The Commission has the authority to grant waiver requests pending the rulemaking, since it has done so on numerous occasions previously. For example, in Texas Instruments, Inc., 73 FCC 2d 733 (1979), the Commission granted a waiver to allow the company to market computer equipment that conformed to its petition for rulemaking. In addition, the Commission delegated authority to the Chief Scientist to grant any future similar waiver requests by other manufacturers. In Checkpoint Systems, Inc., 51 FCC 2d 12 (1974), a waiver was granted to allow the company to market security monitoring equipment pending a rulemaking.^{6/} Likewise, the Commission granted a waiver to allow use of non-conforming DEMS equipment pending action on a

^{6/} The decision to grant the waiver pending the rulemaking was affirmed when subsequently challenged by a competing manufacturer, Checkpoint Systems, Inc., 51 FCC 2d 733 (1975).

rulemaking petition in Local Digital Distribution Co., 57 RR2d 1025 (1985).

In Southwestern Bell Telephone Company, 6 FCC Rcd 6095 (1991), a waiver of Part 69 was granted to allow for common channel signalling charges to be assessed pending the outcome of a related rulemaking. In BellSouth Corporation, 2 FCC Rcd 5146 (1987), the Commission granted a blanket waiver of the tax accounting rules to all the exchange carriers pending a decision on the related rulemaking.^{7/}

In American Broadcasting Companies, Inc., 46 FCC 2d 863 (1974), the Commission granted a waiver of the rules limiting the networks' affiliations in any given market subject to the outcome of the pending rulemaking; the Commission indicated that it would grant similar waivers where the circumstances were likely to fall within the proposed rules.^{8/} In Fox Broadcasting Company, 5 FCC Rcd 3211 (1990), the Commission granted a waiver of the definition of a "network" pending a rulemaking on the financial

^{7/} Cf., Pass Word, Inc., 5 FCC Rcd 1180 (1990) (a waiver was granted to allow a private paging company to provide service to the government even though the rule was being reexamined in a rulemaking, with the Commission indicating that "we do not ordinarily favorably entertain waiver requests of a Commission Rule that is the subject of a pending rule making proceeding"). Video/Phone does not contend that the Commission is compelled by precedent to grant the waiver requests (or that all of the requests must be treated identically). However, the Commission should have examined the applications without dismissing them wholesale, because the Commission has the obligation to review each waiver request, and has the discretion to grant some or all of the waiver requests, and that doing so in the case of otherwise idle spectrum in the 28 GHz band would further the public interest.

^{8/} A similar waiver was granted in Small Market Policy, 57 FCC 2d 889 (1976).

interests and syndication rules, and in Capital Cities/ABC Inc., 2 FCC Rcd 2539 (1987), the Commission continued a waiver of the one-to-a-market rule because it believed that the rule was likely to be changed in an ongoing rulemaking proceeding.^{9/}

In the case of American Telephone and Telegraph Co., 59 RR2d 505 (1985), the Commission granted AT&T a waiver of the Computer II structural separation rules pending the outcome of the Computer III rulemaking proceeding. Similarly, Ameritech was granted a waiver of the Computer II structural separation rules to allow an integrated offering, despite protests that the waiver should be withheld because of the pendency of a rulemaking proceeding addressing these issues. Indeed as the Commission observed in that decision:

Moreover, a failure by the Bureau to consider the waiver requests merely because Computer III was addressing general NCTE issues might itself have been considered to be arbitrary and capricious in view of the serious allegations of customer inconvenience and dislocation advanced in the petitions.

^{9/} In the Capital Cities decision, the pendency of the rulemaking was cited as establishing the likelihood that the public interest would be better served by allowing ownership consistent with the proposed rule. Cf., Spanish International Network, 68 FCC 2d 1260 (1978), where a petition for declaratory ruling was treated as a request for waiver and petition for rulemaking; the waiver request was denied, with the Commission indicating "absent any showing of public interest urgency, we do not think it would be appropriate to grant Spanish International a waiver pending the completion of the rulemaking." In this case, in contrast, the petitioners have demonstrated how the public interest would be well served by prompt implementation of the service, and how the U.S. is likely to suffer if service is delayed during the course of a rulemaking, followed by delayed processing resulting from the inevitable application mills.

American Information Technologies, 1 FCC Rcd 150 (1986).

Likewise in this case, given the public interest benefits from early provision of these new services, it was arbitrary and capricious for the Commission to dismiss wholesale the waiver requests without considering the merits in each case (or even considering distinctions among the different requests), or the public interest benefits that would follow from prompt deployment of these new services. Finally, by way of analogy, the Commission has granted blanket waivers of its rules in lieu of a rulemaking proceeding, so that a fortiori the Commission can grant waivers during the pendency of a rulemaking.^{10/}

The Standards for Grant of a Waiver Have Been Met

The Commission's citation to WAIT Radio^{11/} does not provide support to claim that grant of the waivers is inconsistent with precedent. Indeed, in that particular case the Commission was chastised for its failure to analyze whether a waiver was justified; the Commission had merely indicated that the requested usage was inconsistent with its rules, not unlike its "analysis" here where it asserts that the proposed usage is

^{10/} See, e.g., Access Filings of Small Telephone Companies, 3 FCC Rcd 7173 (1988) (blanket waiver granted to small telephone companies to cross reference the NECA tariff); Ameritech Operating Companies, 6 FCC Rcd 1541 (1991) (blanket waiver of Part 69 Rules granted for proposed operator transfer services). See also, SEC v. Chenery Corporation, 332 U.S. 194, 202-03 (1947) (agencies accorded broad discretion to proceed by adjudication/waiver or by rulemaking).

^{11/} WAIT Radio, 418 F.2d 1153 (D.C. Cir. 1969).

inconsistent with the assignment of the band to point-to-point users.

While we recognize that WAIT Radio and its progeny establish the need for the waiver applicant to demonstrate that the public interest would be served by grant of a waiver, we believe that the standard has been met by the applications filed by the companies related to Video/Phone. Prompt deployment of these new services will well serve the public interest, and added delay will deny the U.S. of critical benefits.

First, new services will be offered to the public in a very short time.^{12/} These valuable services being made available in presently fallow spectrum will include video offerings competitive with the services of the cable companies.^{13/} Moreover, the wholesale dismissal of the applications serves to deprive the public of other new, two-way broadband services, such as "narrowcasting" and local videoconferencing, that are not currently available except to limited numbers of large customers.

Grant of the waiver requests can also allow the service providers to refine and demonstrate the capabilities of the new technologies underlying the pending rulemaking proceeding. Such

^{12/} Indeed, the Commission in the Hye Crest decision required construction to be completed within one year of issuance of the license, Hye Crest Management, Inc., 6 FCC Rcd at 335, a condition it could impose on any other waivers.

^{13/} Cf., Telephone Company-Cable Television Crossownership Rules, CC Docket No. 87-266, FCC 91-234, released November 22, 1991 at para. 8 ("our regulatory approach should foster competition in the video and communications market, so that free market forces rather than governmental regulation will determine the success or failure of new services").

developmental work is critical in order for the U.S. to maintain its current technological lead in millimeter wave transmissions. Through the efforts of the NTIA labs and private entrepreneurs like Video/Phone and Suite 12, the U.S. has developed the capability to make practical use of the 28 GHz band. This technology can make available services both here and abroad using currently fallow spectrum.^{14/} Thus, there are excellent opportunities for U.S. companies to manufacture for export equipment that can provide practical service in these bands, thereby affirmatively helping the U.S. telecommunications trade balance. However, other countries are likely to attempt to copy the U.S. advances, thereby diminishing the expected benefits to this country from having pioneered these services.^{15/}

Therefore, it is critical that the Commission foster additional developmental work through the grant of the requested waivers, where the appropriate criteria have been met. In contrast, the dismissal of the pending applications would have a chilling effect on entrepreneurs like Video/Phone, who have invested significant resources so as to make possible new services using pioneering technology -- precisely the type of

^{14/} Indeed, there is even greater promise and need in lesser developed countries to use these frequencies to deploy initially a broadband telecommunications infrastructure capable of transporting data and video (and capable of carrying voice traffic as well).

^{15/} We understand, for example, that Japanese companies are very interested in developing 28 GHz technologies, and are closely following the millimeter wave work being undertaken at the NTIA labs in Boulder, Colorado.

activity the Commission has been trying to stimulate.^{16/} Finally, the wholesale dismissal of the applications is inconsistent with the Commission's recognition in other dockets that the U.S. cannot afford to let new technology be artificially stifled by regulatory delay.^{17/}

The Wholesale Dismissal of the Applications
Fails to Consider the Particular Aspects
of Each Waiver Request

The Commission's final ground for dismissing all of the requests was that it did not perceive any equitable basis for distinguishing among the applications. There are, however, potentially several distinctions that can be drawn amongst the applicants that could warrant grant in some cases. For example, in some cases the applications were processed in the Commission's normal fashion, with the public having received notice of the application and an opportunity to file competing applications. Prior to the Bureau's imposition of a freeze, some of the applications went past the cut-off date established by the Commission's procedures, so that those applications constitute a distinct class of applications.

^{16/} Cf., Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991) at paras. 18-19 and 37.

^{17/} See, e.g., Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, FCC 92-20, released February 7, 1992; Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991), recon., FCC 92-57, released February 26, 1992.

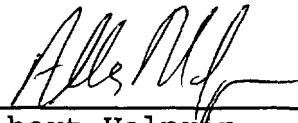
In addition, some of the applications that passed through the filing window did not have any competing applications filed, so there is no question of mutual exclusivity. Thus, a distinction could be drawn based on the absence of mutually exclusivity, thereby obviating the need for the Commission to select between competing applicants. Finally, the Commission could draw further distinctions based upon the availability of additional spectrum in the particular market, since the Commission's proposed rules (as well as most of the applications) contemplate two systems (one in the 27.5 -28.5 GHz band, and the other in the 28.5 - 29.5 GHz band), and in some markets there are no applications for one of the two bands. All of these are potentially valid criteria for distinguishing among the applicants, but the Commission's wholesale dismissal of the waiver requests, without reviewing the individual applications, ignores these factors.

CONCLUSION

Video/Phone believes that the Commission's dismissal of the applications was based on flawed legal and factual grounds. As demonstrated above, the Commission has the discretion to grant the requested waivers, and the public interest would be well served by such action. Moreover, it was error for the Commission to simply dismiss wholesale all of the waiver requests and pending applications. Because the dismissal of the applications was based on the mistaken belief that the grant of waivers was

inappropriate and could not be done in a manner to further the public interest, Video/Phone requests that the Commission reinstate the dismissed applications and proceed promptly to grant such of the waiver requests and applications as appropriate.

Respectfully submitted,
Video/Phone Systems, Inc.



Albert Halprin
Stephen L. Goodman
Halprin, Temple & Goodman
Suite 1020, East Tower
1301 K Street, N.W.
Washington, D.C. 20005
(202) 371-9100

Dated: February 8, 1993

Exhibit A
Statement of Don Franco

I am the President of Video/Phone Systems, Inc. ("Video/Phone"). In that position, I am responsible for monitoring 28 GHz band developments at the FCC, including tracking the filing of applications by our related companies and others.¹ I have maintained a data base of 28 GHz applications that have been filed, and those that have appeared on Public Notice.

I am aware of only two licenses that have been granted in those bands in the U.S. since 1991: a license in New York City and an experimental license in Texas. Both licenses were for point-to-multipoint services. I am not aware of any terrestrial point-to-point applications that have been filed or granted during that time.

If any point-to-point applications were to be filed, however, I believe that such applicants could be accommodated in the markets in which we have filed applications. In light of our planned deployment schedules, there should be 28 GHz spectrum not required for initial operation of our systems that could accommodate point-to-point applicants. In addition, once the Commission reallocates the 28 GHz band as proposed in its Notice of Proposed Rulemaking, any previously licensed 28 GHz applicants can be accommodated in alternative spectrum. Thus, I do not believe that grant of our waiver requests and applications would

¹ Applications have been filed by the following companies related to Video/Phone: Evanston Transmission Company; CT Communications Corporation and CellTel Communications Corporation.

be detrimental to any point-to-point users assigned to the 28 GHz band.

I declare under penalty of perjury that the foregoing is true and correct. Executed February 8, 1993.

A handwritten signature in cursive script, appearing to read "Don Franco", is written over a horizontal line.

Don Franco
President
Video/Phone Systems, Inc.